



Joint Bar Council and Criminal Bar Association response to the Ministry of Justice Crime Lower Consultation

Introduction

1. This is the response of the Young Criminal Bar Association, the Criminal Bar Association, the General Council of the Bar of England and Wales (the Bar Council) and the Young Barristers' Committee of the Bar Council, to the Ministry of Justice "Crime Lower Consultation."¹
2. The consultation concerns the legal aid fee schemes of the Police Station and the Youth Court. Our response focusses on the Youth Court fee scheme. We defer to our solicitor colleagues with more direct experience to comment on the Police Station fee scheme.

Youth Court specialists

3. In 2016 Charlie Taylor's Review of the Youth Justice System recommended that:

"the Ministry of Justice reviews the fee structure of cases heard in the Youth Court in order to raise their status and improve the quality of legal representation for children, and when this is complete, that the Bar Standards Board and the Solicitors Regulatory Authority should introduce mandatory training for all lawyers appearing in the Youth Court".

The Taylor Review also recommended there should be a presumption that children receive free legal representation at the police station.

4. In 2019 following the CPS pay review the Crown Prosecution Service now pay a higher rate to its agent prosecutors in the youth court than in the adult magistrates' court.

¹ <https://www.gov.uk/government/consultations/crime-lower-consultation>

5. In 2020 the Centre for Justice Innovation and Institute for Crime and Justice Policy Research report on the Youth Court Report highlighted the need for youth court practitioners to be specialists:

“[m]ore needs to be done to incentivise defence advocates working in youth court to develop their skills in communicating with young people and their understanding of the distinctive features of the youth court.”

They recommended that the LAA should enable advocates with qualifications in youth court practice to claim higher rates of remuneration as happens in a number of other specialist areas.

6. There is a recognition that the quality of legal representation of children in the criminal justice system is variable and that additional specialist training is needed for lawyers representing children. There is evidence that it is increasingly difficult to find suitably experienced Rape and Serious Sexual Offences (RASSO) Counsel to defend and prosecute cases. Given the lower rates of fees and status, this problem is potentially more acute in the Youth Court and is supported by anecdotal evidence provided by District Judges.
7. The recent ‘*Good Practice Guidance on Certificates for Assigned Advocate in the Youth Court*’,² published by the Youth Justice: Quality of Advocacy Working Group, has been an attempt to increase remuneration in the Youth Court to address variable standards in the quality of legal representation. In its foreword the Chief Magistrate wrote:

“[T]he appropriate use of advocates with the necessary skills and training are essential to ensure fair and efficient justice.”

Increased need

8. In recent years a number of developments have increased the likelihood that children facing serious cases have their trials in the Youth Court. Lord Justice Davis in *BH v Norwich YC (2023) EWHC 25* emphasised the presumption that even when charged with serious offences, in this case a 17 year old who had turned 18 charged with rape, that cases involving children are tried in the Youth Court. Paragraph 67 of the judgment reads:

² <https://www.criminalbar.com/wp-content/uploads/2023/11/QAWG-Good-Practice-Guidance-on-Certificates-for-Assigned-Advocate-in-the-Youth-Court-27.11.23-v1.1F.pdf>

“First, it is a legitimate aim to try cases involving children and young people in the Youth Court. That court allows trials to be conducted in private, in a manner specifically adapted to the needs of young people. It is also relevant that Youth Court trials allow the proceedings to be expedited and avoid the delays that are frequently encountered in Crown Court listing. This expedition is in itself, a legitimate aim when considering the needs of children and young people. BH, charged with rape, will be properly represented by counsel and will be tried by a specialist and professional judge who will give full reasons for his decision. It is not suggested that a defendant in the Youth Court will not have a fair hearing (it is not sub Rolls Royce) and indeed is in many respects much more beneficial to a defendant”.

9. There is judicial encouragement to sever cases involving child defendants jointly charged with adults and to remit cases to the Youth Court for trial. Even where this would result in two trials and witnesses giving evidence twice. (See the Judicial note on the application of well-established allocation principles in youth justice cases during the COVID-19 emergency).
10. There is now a duty on the Crown Court to consider whether to remit a child defendant for trial and sentence. As of 28 April 2022, Section 11 of the Judicial Review and Courts Act 2022 amended the Senior Courts Act 1981 and introduced a power for the Crown Court to remit adult and/or child defendants to the magistrates’ court for trial. Section 11 also amended Section 25 of the Sentencing Code 2020 to provide the Crown Court with the power to remit a youth defendant to the Youth Court even where the defendant has been committed for sentence.

Increased fees

11. It must be appreciated that child defendants are, by virtue of their age, vulnerable and require specialist advocates to represent them in the Youth Court. There is widespread agreement that the criminal barristers representing children require specialist knowledge and skills.
12. The Criminal Legal Aid Independent Review (CLAIR)³ made clear that an increase in funding is necessary to reflect the attention and skill required to represent children in criminal proceedings.
13. When barristers apply to the Bar Standards Board for a practising certificate they are required to register for approval to undertake work in the Youth Court, due to the vulnerabilities of clients and the need for specialist skills.

³ <https://www.gov.uk/guidance/criminal-legal-aid-review>

14. In 2022, the most recent year of which we have a complete set of data, of 4,705 barristers who undertake criminal work, 3,308 are registered to undertake Youth Court work. This includes 108 KCs.
15. There is a need to widen the scope for “Assigned Counsel” in Youth Court cases, to ensure appropriately trained advocates are conducting the advocacy in serious cases involving children. It is not yet possible to assess whether the new Good Practice Guidance issued at the end of 2023 has had any impact.

Payment of fees

16. We consider that fees for the advocate (whether as assigned counsel or unassigned counsel) should be claimable by the advocate direct to the Legal Aid Agency (LAA). Separate payment is not unusual for the LAA, for example in the Crown Court there is a fee for the litigator (LGFS) and a fee for the advocate (AGFS) and the advocate claims the advocacy fee direct from the LAA.
17. The retention of the single combined fee in the Youth Court means that solicitor firms must share the fee with the advocate and currently, given the low fees paid to solicitor firms they are under extreme pressure to provide a low fee to the advocate. This fails to achieve the objective to provide specially trained advocates to represent children in the Youth Court.

The ‘Deal’

18. It is worth repeating that the part of the deal offered by the Government in September 2022, on which the criminal Bar voted to approve suspension of their action, included, “a further uplift to youth court fees to the value of £5m per annum from April 2024.”⁴ If that fee increase is implemented such that the criminal Bar are not provided with any additional remuneration this would be in breach of the “deal” with the criminal Bar.

Proposal

19. Youth Court fees are currently based on the magistrates’ court fee scheme. Prior to 2001 that fee scheme separately identified the fee for advocacy, and the advocate claimed direct from the LAA. The current fee scheme has a single fee which is paid to the solicitor firm.

⁴ MoJ “Heads of Terms of Offer” September 2022.

20. If it is not immediately possible to put a separate fee scheme in place the only other option is for an agreement to be reached between the criminal Bar and solicitors' firms such as the Protocol⁵ with the London Criminal Solicitors Association (LCCSA).
21. In magistrates' court cases in Greater London, members of the LCCSA have agreed a base advocacy fee of £86.25 for a half day trial and £172.50 for a full day trial. Since Youth Court representation demands more specialised and experienced counsel any fee agreed as part of a protocol would have to be significantly in excess of this fee.
22. The Consultation states:

"54. The new Youth Court fee scheme would include an enhanced fee for the most serious offences (all indictable only and triable either way cases). These cases would receive a fixed amount of £658 (including VAT) or £548.33 (excluding VAT) **in addition to** the current fees paid for Youth Court cases under the magistrates' fee scheme."

For a total fee that can be as much as £1,380.18 (Table 3 on page 20) it is not viable for a criminal barrister to be paid fees, for example, of only £172.50 for the advocacy.

23. In addition to the need for a fair distribution of the fee, the proposed global fee increase remains inadequate. CLAIR recommended the criminal legal aid fees payable in the Youth Court to be increased to reflect the importance of this work and seriousness of the young defendant's situation. The increased fees will remain inadequate for the seriousness of the work. The equivalent Crown Court fee should instead be payable.

Response to the Consultation Questions

Questions 1-8 and 13-14.

Regarding the Consultation questions on the Police Station fees scheme and Pre-Charge Engagement, the Bar Council defers to our solicitor colleagues who have more direct experience.

We make the general point that Police Station fees should be increased to enable experienced practitioners to properly advise those in custody. The proposal is for

⁵ <https://www.barcouncilethics.co.uk/documents/protocol-instruction-counsel/>

only a small step in that direction. The recommendations of CLAIR still need to be fully implemented.

“Q.9. Do you agree with having a separate Youth Court fee scheme outside of the current magistrates’ fee scheme? Please explain your answer.”

24. Yes. The Youth Court often deals with offences with various complexities, with defendants and witnesses requiring intermediaries and special measures and have additional disclosure obligations particularly reports from social services and or schools. All this requires additional time to prepare trials, and or making legal arguments particularly in relation to abuse of process and for review under the code for crown prosecutors. In comparison, magistrates’ court trials are often more straightforward factual disputes.

25. The Bar Standards Board, which regulates barristers, recognises this and requires barristers who undertake work in the Youth Court:

“to register that and declare that they have the specialist skills, knowledge and attributes necessary to work effectively with young people, as set out in the Youth Proceedings competences and guidance.”⁶

Barristers also have a code of conduct duty not to undertake work that is beyond their competence or experience (BSB Handbook rC21.8).

26. The Bar Council’s view is; therefore, it is right to have a separate fee scheme for the Youth Court, which pays higher rates than the magistrates’ fee scheme.

27. We do not agree that the increased fee ought to be encompassed within the single litigators fee. There should be a separate fee for advocacy paid direct to the advocate – see our Introduction section above. This will ensure that the advocate conducting the preparation and trial has certainty that they will be paid promptly. In the recent survey conducted by the CBAYBC on working conditions of the criminal Bar in the magistrates and Youth Courts, 57% of junior barristers stated that they had to wait for payment from the solicitor firm on average for longer than 6 months.

28. The process of delays from indirect payment via the solicitor firm creates cashflow problems and results in counsel turning away from Youth Court work.

⁶ <https://www.barstandardsboard.org.uk/for-barristers/compliance-with-your-obligations/what-do-i-have-to-report-or-tell-to-the-bsb/registration-of-youth-courts-work.html>

As a consequence, less experienced and more junior advocates are those that accept Youth Court instruction, which fails to address the concerns of CLAIR.

“Q.10. Do you agree with the enhanced fee proposal for the Youth Court? Please explain”

29. In principle we agree that the enhanced fee proposals, however, it would still fail to address the issues raised in CLAIR.

30. Paragraph 45 of the Consultation summarises the false choice that the MoJ presented in its previous consultation:

“45. [...] As part of our government response to CLAIR, we consulted on two options:

Option 1: Widening the scope for “Assigned Counsel” to all Indictable Only offences. In this option, a certificate for counsel would be automatically available for all indictable only offences heard in the Youth Court, allowing an advocate to support the case alongside a solicitor.

Option 2: Enhanced Youth Court fee for all Indictable Only and Triable Either Way offences. In this option, an enhanced fee would be paid within the current scheme for all indictable only and triable either way Youth Court cases.”

These should never have been presented as “either / or” options.

31. The Bar Council in its June 2022 Response to that consultation, stated:

“The Bar Council agrees with paragraph 186 that certificate for counsel should be automatically available for all indictable only offences heard in the Youth Court. We also agree with paragraph 187 that Youth Court fees should be increased.”⁷

32. The only reason the MoJ gave for not widening the scope of assigned counsel is in paragraph 46 of this consultation, that:

“46. [...] Option 1 would not necessarily lead to improvements in the quality of representation provided to children in the Youth Court as Crown Court advocates may not have the required knowledge or experience to undertake work in the Youth Court.”

⁷ Page 31:

<https://www.barcouncil.org.uk/asset/8B6B8466%2D5B92%2D48DD%2DB48D055A0442BF83/>

33. The whole purpose of a Representation Order for assigned counsel is to ensure representation from a specialist advocate. For the MoJ to think that a higher quality of representation can be assured for the defendant by not having assigned counsel is astonishing.
34. In all either-way and or indictable only matters, the representation order should be extended to assigned counsel to encourage dedicated Youth Court practitioners and improve the quality of representation in the Youth Court.
35. The aim of the enhanced fee proposal is to ensure that children receive high quality specialist advocacy in the Youth Court. The enhanced fee is a start; however, the fee would still be below the fee paid for a low level theft trial at the Crown Court. The fee should be the same as if it were to be heard in the Crown Court. It requires the same amount of work, expertise and advocacy skill. Given the Crown Court backlogs, criminal barristers can be fully engaged doing that higher paid work and there is not an incentive to do the same level of work in the Youth Court for less money. This still needs to be addressed.

“Q.11. Do you agree with the enhanced fee being targeted towards the most serious offences (i.e. indictable only and triable either way offences)? Please explain your answer.”

36. Yes. The more serious cases require the greater amount of work and expertise and should therefore have a higher fee than less serious cases.

“Q.12. Do you agree with our proposal to not make changes to the Prison Law and CCRC fee scheme at this stage?”

37. We defer to the Association of Prison Lawyers who have more expertise in this area.

“Q.15. From your experience are there any groups or individuals with particular protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.”

“Q.16. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons?”

38. We do not have sufficient data to answer these questions.

28 March 2024

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